FILED
FEB 7 196
JOHN F. DAVIS, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,

No. 584. *vs.*

ROY ALLEN STEWART, Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

ERNEST ARTHUR MIRANDA, Petitioner,

No. 759. *vs.*

THE STATE OF ARIZONA, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Arizona.

MICHAEL VIGNERA, Petitioner,

No. 760. *vs.*

PEOPLE OF THE STATE OF NEW YORK, Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York.

SYLVESTER JOHNSON and STANLEY CASSIDY, Petitioners,

No. 762. *vs.*

STATE OF NEW JERSEY, Respondent.

On Writ of Certiorari to the Supreme Court of the State of New Jersey.

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AMICUS CURIAE.

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BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AMICUS CURIAE.

QUESTIONS PRESENTED.

1. Does the decision in *Escobedo* v. *Illinois* extend beyond its facts to require, before interrogation, admonishment of the accused of his right to remain silent

and of his right of counsel, with failure to so proceed excluding from evidence any statement obtained thereby?

2. Does the rule announced in *Escobedo* v. *Illinois* have retrospective application?

INTEREST OF AMICUS.

The National District Attorneys Association is an organization of state prosecuting attorneys whose members in their official capacity represent approximately two-thirds of the population of the United States. It is upon these state prosecuting attorneys that the responsibility of presenting the overwhelming majority of criminal cases rests. The express purpose of the Association as amicus curiae is to delineate the grave concern (and the causes therefor) of prosecuting attorneys and law enforcement officers, if not that of all the people, with the adverse affect the Court's decision in these matters could have on the preservation of our free society—its safekeeping for all the people.

It is not for amicus to further discuss, dissect and distinguish, if possible or necessary, the law. Certainly the case law, the legal theories and the peculiar facts in the four matters presented here are thoroughly, indeed proficiently, covered by the parties.

The rules and regulations which have the force of statute are founded not only upon precedent but upon facts—and at times, necessarily, upon hypothesis. Therefore, it is believed that this Association can best serve the Court through the factual information, gathered by members of this Association, on the actual use of confessions. This data is offered for the Court's consideration in arriving at its decision on the questions before it.

In addition to the statistical data, it would seem that amicus can assist the Court by outlining the existing and

foreseeable difficulties as regards clarification, definition and retroactivity in application. Accordingly, with the consent of parties, this brief is respectfully submitted by the Association as evidence of its concern in and for the course of criminal justice, the future state of which will be determined in the matters now before the Court.

SUMMARY OF ARGUMENT.

Re: Interpretation of Escobedo v. Illinois.

Those entrusted by the people with the enforcement and administration of our criminal laws complain, as overburdened persons do, when short cuts are eliminated from their repertoire of expedients for effectively and adequately fulfilling the great burden and responsibility placed upon them. However, they recognize and accept reasonable rules which can be followed, though with some difficulty, and which have benefits far outweighing their inexpediency: *Mapp* v. *Ohio,* 367 U. S. 643 (1961), may well be an excellent illustration. Unlike *Mapp* which conclusively condemned a practice known to be unconstitutional, an extended *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), introduces a heretofore unknown standard of constitutionality.

Few would disagree with most of the Supreme Court decisions affecting law enforcement, finding the reversals (including *Escobedo*) correctly decided upon their facts. The difficulties of effective performance, experienced by those engaged in the enforcement and administration of our criminal laws (including and even emphasizing the judiciary), originate in the fact that the rules are promulgated upon the exceptional case and thereafter are subject to so many different interpretations. Why a case is allowed to advance to the appellate stage or why there is not a confession of error where there is an obvious violation of funda-

mental rights is influenced by local problems. And yet, the entire nation may be penalized for the sins of a few—albeit the case is atypical not only for the nation but for that locality.

The states have been described as fifty different countries. Officers vary from state to state, city to city, department to department. Police officers should not be subjected to symbolism—personifying evil in our midst. There are the good and the bad, the qualified and the unqualified, in the same manner as legislators, judges, firemen or medical doctors. We are a nation of specialists. Police officers, who will be directly affected by any extension of *Escobedo,* are specialists.. Prosecuting attorneys, trial judges and basically all appellate judges—although not specialists in the methodology of crime investigation—have worked closely with the problems and have expressed, almost unanimously, the opinion that *Escobedo* should not be afforded the extreme construction. Those courts which have ruled otherwise have done so because they believed the admonishment to be an inevitable Supreme Court command. Thus, their concern was with avoiding a backlog of cases from the date of *Escobedo* to its actual clarification. *People* v. *Dorado,* 62 Cal. 338, 398 P. 2d 361 (1965).

Those rules and regulations, which find themselves workable not because they are followed but because the populace in the first instance and the trial judges thereafter, both through misunderstanding and understanding, allow the standard to go unenforced, are not a preferred observance. One of the outstanding criminal law authorities in England, if not in the world, expressed this idea of operable-by-default rules in explaining the reason why certain restrictive measures can exist in his country without hindering police investigations: "The law works as well as it does chiefly because the moral authority of the police

enables them to get on without powers." Williams, *Demanding Name and Address*, 66 L. Q. Rev. 465, 476 (1950).

To be effective an admonishment must be more than a ritual. And the benefits received from a properly administered warning would not accrue to the innocent nor to the Culombes, Fikeses, Haleys, Paynes or Recks of our society. The beneficiaries are the professional and the recidivist. Without bestowing or acquiring a benefit, the American people cannot afford to abandon the confession as a form of evidence.

The objective of the admonishment cannot be to place a burden which becomes so onerous that it invokes devised extenuation. To resort to circumvention, although not intentionally illegal, nonetheless may markedly devaluate respect for law and order. A rule which can be rationalized by those who execute it does not offer the solution. The experience of the English in the use of the Judges' Rules is illustrative:

> The Rules undoubtedly require the observance of a very high standard, and it may be a higher standard than the average policeman was in the first instant naturally inclined to adopt. It is difficult to say what extent the spirit of the Rules is infringed because, as I have said *it is the general habit of the police never to admit to the slightest departure from correctness.* Devlin, The Criminal Prosecution in England 47 (1960). (Emphasis added.)

A rule for a rule's sake is not the answer.

In balancing the equities, it is obvious that eventually a point of diminishing returns is reached. The drawbacks which may result from an extension of *Escobedo* beyond its facts should be studied. To establish an absolute "enforcement-type exclusionary rule" can well lead to punishment of the populace rather than the police. Before *Mapp* v. *Ohio*, 367 U. S. 643 (1961), there was a warning to re-

assess given by the Court in *Wolf* v. *Colorado*, 338 U. S. 25 (1949). No one can now doubt that the Supreme Court can and will do as it states. However, crime waits for no man or court. But man can implement and adjust, given notice and a reasonable time to do so. Therefore, would it not be reasonable and proper for the Court to formulate a workable standard, without attaching thereto a dogmatic rule of exclusion? Cannot the state and federal authorities be given an opportunity to establish working rules, to increase the quantity and to improve the quality of their personnel and to otherwise effect the desired result? Certainly such good faith is being registered by governmental and private groups now engaged in these pursuits.

Under the guidance of an opinion by this Court, an advisory rule would afford an opportunity to accelerate research and to effect changes without the disastrous results of impediment and confusion. One step may well destroy that which we know, the other build that which we need. We respectfully request the Court to take the latter course: the advisory rule. We do not presume to suggest to the Court a drafted rule. The Judges' Rules of England were established as an advisory standard by the judges themselves but at the request of the police for their guidance. We would ask the same approach be taken. The members of this Association and prosecuting attorneys and law enforcement officers everywhere in this country stand ready to assist this Court in any manner which will further the objective of the proper enforcement of the criminal laws for the benefit of all the people.

Re: Retrospective Application.

The effect of retroactive application of *Escobedo* would involve all of the problems which such a determination would have had in *Mapp*, but for *Linkletter* v. *Walker*, 381 U. S. 618 (1965) and *Angelet* v. *Fay*, 381 U. S. 654 (1965). The arguments presented by this amicus in *Linkletter* and *Angelet* are relevant and even more pertinent here. The reasoning of *Tehan* v. *Shott*, 34 U. S. L. WEEK 4095 (January 19, 1966), should be extended to *Escobedo* as well.

ARGUMENT.

CONFESSIONS (STATEMENTS) ARE VITAL IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES. THE EFFECT OF ADMONISHMENT OF RIGHT TO REMAIN SILENT AND, IN PARTICULAR, THE RIGHT TO COUNSEL AT THE INTERROGATION STAGE WILL MATERIALLY AFFECT THE ENFORCEMENT OF OUR CRIMINAL LAWS. TO GIVE RETROSPECTIVE APPLICATION TO THE NEW CONSTITUTIONAL STANDARD PROCLAIMED IN ESCOBEDO v. ILLINOIS WILL DIMINISH AND DETER EFFECTIVE LAW ENFORCEMENT. THE NEED IS FOR AN ADVISORY STANDARD, NOT AN EXCLUSIONARY RULE.

The issues before the Court stem from *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and the requisite clarification of the five principles laid down by the Court in that decision: (1) if the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect; (2) if the suspect has been taken into police custody; (3) if the suspect is interrogated in a manner that lends itself to eliciting incriminating statements; (4) if the suspect has requested and been denied an opportunity to consult with his attorney and (5) if the police have not effectively warned him of his absolute constitutional right to remain silent, then any statement given by the accused is of no evidentiary value.

Two constructions of *Escobedo* have evolved, so-called the strict interpretation and the liberal interpretation. The strict interpretation is: *Escobedo* should be limited to its facts. If the request of the accused to consult with his attorney is refused, any confession elicited is inadmissible as being in violation of his right to have present the guiding hand of counsel—which right he did not intelligently waive.

This is the construction given by the majority of state and federal courts. The liberal interpretation is: no probative evidence may be obtained until and unless the accused has been duly admonished of his absolute right to stand silent to any and all inquiry, and furthermore, of his right to consult with an attorney. This is the construction assumed by a minority of the state and lower federal courts. Because of population and the consequent number of criminal cases, the most prominent advocate of this view is California. *People* v. *Dorado,* 62 Cal. 2d 338, 398 P. 2d 361 (1965). The two other state courts that have given this same interpretation are Rhode Island [*State* v. *Dufour,* 206 A. 2d 82 (R. I. 1965)] and Oregon [*State* v. *Neely,* 239 Ore. 487, 398 P. 2d 482 (1965)]. By having joined with this minority of state appellate courts, the Third Circuit Court of Appeals appears alone among the courts of appeal of the ten circuits. *Russo* v. *New Jersey,* 351 F. 2d 429 (3d Cir. 1965). Pennsylvania has revised its original construction in light of *Russo. Commonwealth* v. *Negri,* 213 A. 2d 670 (Pa. 1965).

I. ANY RULE DERIVED FROM ESCOBEDO v. ILLINOIS SHOULD BE LIMITED TO THE FACTS OF THAT CASE.

A. Escobedo Declares a New Constitutional Standard, Differing From Previous Court Decisions Restricting Police Investigation.

Whatever the purported rule is, it is new. Prior to *Escobedo,* the denial of counsel at any stage preceding arraignment was, at the very most, a factor in the "totality of circumstances" on the issue of voluntariness. Thus, differing from *Mapp* v. *Ohio,* 367 U. S. 643 (1961), and other cases which concerned fundamental rights, the denial of counsel, even upon request, was not a violation of any known constitutional precept. *Crooker* v. *California,* 357 U. S. 433 (1958). And so, when we speak of admonishing